

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 22, 2007

STATE OF TENNESSEE v. ERIC WAYNE AGNER

Direct Appeal from the Circuit Court for Blount County
Nos. C-15812, C-15813, C-15814 D. Kelly Thomas, Jr., Judge

No. E2006-01616-CCA-R3-CD - Filed August 15, 2007

The defendant, Eric Wayne Agner, appeals the trial court's revocation of his probation. The defendant admitted that he did not contact his probation officer after being released from jail. He also acknowledged that he had made no payment toward his court costs, probation fees, or restitution and that he failed to provide a DNA sample as ordered. Accordingly, we affirm the judgments from the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ALAN E. GLENN, JJ., joined.

Stacy Nordquist, District Public Defender, and J. Liddell Kirk, Knoxville, Tennessee, for the appellant, Eric Wayne Agner.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Tammy Harrington, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant pled guilty to two counts of theft and a count of criminal simulation. His effective two-year sentence was suspended after serving thirty days in confinement. After release from confinement, the State filed a probation revocation warrant. During the probation violation hearing, the defendant's assigned probation officer testified that he had never seen the defendant until the hearing. He said that he had attempted to contact the defendant through written correspondence on February 8, 2006, but was unsuccessful because the defendant had been released from jail on January 24, 2006. The probation officer testified that he attempted to reach the defendant through information he had received from the office of the public defender. The probation officer said that he sent written correspondence and phoned the last available telephone number for

the defendant but was unsuccessful in contacting him until he reached the defendant by phone on February 21, 2006. The defendant agreed to meet with him on February 23, 2006, but did not keep his appointment. The probation officer also said that the petitioner had made no payment toward his court costs or restitution and had failed to provide a DNA sample as ordered.

Next, the defendant testified that he knew he was required to report to a probation officer upon release from jail. He said that, because he was hospitalized shortly after his release from jail, he did not immediately report to a probation officer and that he did not report after he was released from the hospital because he was arrested two days later on a charge pending in Knox County. He testified that he was incarcerated in Knoxville until the end of March. He said he spoke with the probation officer but was unable to keep the appointment because he was arrested and taken to Knoxville. He said he did not call his probation officer because he made a mistake.

The defendant testified that he did electrical work for his uncle and explained that he had an associate degree in electrical engineering. He admitted that he had made no payment toward his court costs, probation supervision fees, or restitution. He also acknowledged that he had not submitted a DNA sample. However, he asked the court for a second chance, stating, "I can do it this time."

On cross-examination, the defendant said that, approximately two weeks after his release from the hospital, he was arrested and taken to the Knoxville jail. He testified that he made no attempt to contact the probation officer and that he was arrested on the day the probation officer contacted him. The defendant brought no proof of his hospital stay or his incarceration in the Knoxville jail. He said he had worked for his uncle prior to the underlying charges; however, he brought no proof of his employment. He testified that he earned between \$600.00 and \$700.00 per week. He acknowledged that he had never tried to contact his probation officer and that he had ignored his probation for the last month.

At the conclusion of the hearing, the trial court revoked a portion of the defendant's probation and ordered him to serve an additional 220 days, after which he would again be placed on probation. The court told the defendant that he would be released after serving additional time and that he would be given another opportunity to report to his probation officer. The court admonished the defendant that, after his release, compliance with the terms of his probation would determine the manner of service for the final two-thirds of his sentence.

Analysis

The defendant contends that the trial court abused its discretion in revoking his probation. Specifically, the defendant argues that the evidence was insufficient to find that his violation of probation was willful.

A trial court may revoke probation and order the imposition of the original sentence upon a finding by a preponderance of the evidence that the defendant has violated a condition of probation.

T.C.A. §§ 40-35-310, -311. The decision to revoke probation rests within the sound discretion of the trial court. State v. Mitchell, 810 S.W.2d 733, 735 (Tenn. Crim. App. 1991). Revocation of probation and a Community Corrections sentence are subject to an abuse of discretion standard of review, rather than a de novo standard. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). Discretion is abused only if the record contains no substantial evidence to support the trial court's conclusion that a violation of probation or Community Corrections sentence has occurred. Id.; State v. Gregory, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997). Proof of a violation need not be established beyond a reasonable doubt, and the evidence need only show that the trial judge exercised a conscientious and intelligent judgment, rather than acted arbitrarily. Gregory, 946 S.W.2d at 832; State v. Leach, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995).

The defendant argues that the trial court abused its discretion by revoking his probation. To revoke a sentence of probation, a trial court must find by a preponderance of the evidence that the defendant violated the terms of his probation. Here, the defendant admitted he violated his probation. He acknowledged that he did not attempt to contact his probation officer and admitted that was a mistake. He also admitted that he did not submit a DNA sample as ordered. These factors are sufficient to find a preponderance of the evidence; therefore, we are compelled to find that the discretion of the trial court was not abused. We affirm the judgments of the trial court.

Conclusion

Based on the foregoing and the record as a whole, we affirm the judgments from the trial court.

JOHN EVERETT WILLIAMS, JUDGE